



PRESTON GATES ELLIS &  
ROUVELAS MEEDS LLP  
ATTORNEYS

MARTIN L. STERN  
DIRECT DIAL: (202) 662-8468

EX PARTE OR LATE FILED

September 10, 1998

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

**Re: Notice of Ex Parte Presentation, MM Docket No. 95-176**

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206(a)(2), Game Show Network L.P. is filing with the Secretary an original and one copy of this notice of ex parte presentations in the above-captioned proceeding.

On September 10, 1998, prior to the release of the Sunshine Agenda for the Commission's September 17 meeting, Game Show Network provided a copy of its attached White Paper entitled, "Closed Captioning and Recently Launched Cable Networks" to the Chairman, the Commissioners, their legal advisors, and to the Cable Services Bureau.

Sincerely,

Martin L. Stern

Attachment

cc: Chairman William E. Kennard, Commissioner Susan Ness,  
Commissioner Harold Furchtgott-Roth, Commissioner Michael K. Powell,  
Commissioner Gloria Tristani  
Susan Fox, Anita Wallgren, Helgi C. Walker, Jane E. Mago, Rick Chesson  
Deborah A. Lathen, William H. Johnson, Meryl Icove,  
Marcia Glauberman

No. of Copies rec'd  
List ABCDE

**CLOSED CAPTIONING AND  
RECENTLY-LAUNCHED CABLE NETWORKS**

**Submitted by**

**Game Show Network, L.P.**

**In**

**MM Docket No. 95-176**

**September 1998**

## INTRODUCTION

Game Show Network (GSN), in this paper, focuses on several issues that affect start-up networks. GSN fully supports the goal of closed captioning as much programming as is economically feasible. However, the large costs associated with the Commission's announced rule places an unduly large burden on new networks. Thus, some flexibility is necessary if the Commission's goal is to achieve maximum captioning without unduly burdening start-up networks. GSN recommends the following:

- **First, the new network exemption should run from the effective date of the Commission's rules. Once a new network's exemption expires, it should receive the same phase-in period allowed by the Commission's rules that other networks are currently receiving.**
- **Second, the revenue exemption, which largely applies to new networks, should be higher than \$3 million. The additional and unanticipated cost of captioning would force many of these recently launched networks – already struggling to survive in an intensely competitive marketplace with high costs and little revenue – to use scarce funds for captioning instead of programming, a result that both Congress and the Commission sought to avoid.**

To understand the importance of these exemptions, it is essential for the Commission to consider certain facts that permeate the new network environment.

## DISCUSSION

### I. The Cost Of Launching A New Network Is Significant

Launching a new cable network like GSN is an expensive undertaking. In the Commission's closed captioning proceeding, several parties noted that launching a new network can cost as much as \$100 million.<sup>1</sup> GSN believes that, in the current environment, the cost is closer to \$150 million. Much of this money is **not** spent on programming. Rather, much of a start-up network's funds go towards purchasing carriage on as many cable systems as possible.

Many new networks are required to pay upfront "launch fees" to cable operators for distribution that can run into the tens of millions of dollars. Indeed, recent reports indicate that even direct-broadcast satellite (DBS) providers – which have a fraction of multichannel video programming distribution (MVPD) subscribers compared to established cable companies – have begun demanding as much as six dollars per subscriber before they will carry a new cable network.<sup>2</sup> In the case of the largest DBS provider, DirecTV, with 3.5 million subscribers, a new

---

<sup>1</sup> Report and Order, MM Docket No. 95-176, FCC 97-279 ¶ 91 (Aug. 22, 1997) ("*Report and Order*").

<sup>2</sup> Linda Moss & Monica Hogan, *Channel-Locked*, MULTICHANNEL NEWS, at 1 (April 6, 1998)(copy attached).

network's launch fee could amount to **\$21 million** simply for **access** to a relatively small universe of potential viewers.<sup>3</sup> At least one new cable network, Fox News, reportedly has paid cable operators almost \$14 per subscriber<sup>4</sup> and there are reports that Pax Net, another new network, may pay as much as \$6 per subscriber and give the cable operator as much as 4 minutes an hour of advertising time.<sup>5</sup> Many cable operators not only compel new networks to pay for carriage, but often also require them to forego any subscriber license fees for several years.<sup>6</sup> In short, the real economics of launching new networks may be very different than the Commission's assumption.

#### **A. Subscriber Numbers Do Not Mean Actual Viewers**

Of course, obtaining access to potential viewers is only a first step. Even if a new cable network is **available** to millions of homes, that availability does not equal the actual number of viewers. Only a tiny fraction of those available homes actually watch any particular network. The highest rated cable program today, "South Park" on Comedy Central, despite repeated showings per week, is seen by only **2.9 million actual viewers** out of the **47 million** households with access to Comedy Central – six percent of the potential Comedy Central audience, four percent of all MVPD households, and less than three percent of all U.S. television households.<sup>7</sup> Most recently launched cable networks struggle to reach even one-tenth of one percent of total television viewers.<sup>8</sup> This is key because advertising revenue is tied to the actual number of viewers rather than the number of homes in which the service is available.

#### **B. Recently Launched Cable Networks Experience Multi-Million Dollar Losses Annually**

With low initial ratings that are based on actual viewers, not on homes passed, virtually no start-up network earns a profit. In fact, major advertisers often refuse to place ads on cable networks with access to less than 25-35 million homes. That excludes nearly every recently launched network from those potential advertising revenues.<sup>9</sup> Moreover, as noted above, new networks not only pay cable operators for distribution, but also forego subscriber license fees for years after launch.<sup>10</sup>

---

<sup>3</sup> *Id.* at 77.

<sup>4</sup> "Paxson renders unto TCI," *Broadcasting and Cable*, at 6 (May 4, 1998).

<sup>5</sup> "Pax Net nabs outlets with Comcast accord," *Daily Variety*, at 3 (July 8, 1998); "Paxson Makes Cable Connections," *Broadcasting and Cable*, at 17 (August 3, 1998).

<sup>6</sup> Paul Kagan Associates, Inc., *Cable TV Programming* (Feb. 28, 1998). This gives an advantage to companies that own multiple cable networks, which reduce their affiliate fees on well-established cable networks in exchange for carriage of their less-carried networks. *Id.* "Solo" cable networks must forego affiliate fees simply to be carried.

<sup>7</sup> *Top Cable Shows*, *BROADCASTING & CABLE*, at 58 (Feb. 23, 1998); Fourth Annual Report, *Annual Assessment of Competition In Markets for the Delivery of Video Programming*, 11 CR 147 (rel. Jan. 13, 1998).

<sup>8</sup> Linda Moss, '97: *Big Year for TNT, Cable*, *MULTICHANNEL NEWS*, at 1, 42 (Jan. 5, 1998) (new networks Fox News, Animal Planet, and MSNBC had 1997 primetime ratings below one rating point).

<sup>9</sup> Paul Kagan Associates, Inc., *History of Start-Up Networks*, *ECONOMICS OF BASIC CABLE NETWORKS* (1997).

<sup>10</sup> *Report and Order* at ¶ 91.

As a result of these factors, even recently launched cable networks with revenues in the tens of millions of dollars and as many as 30 million potential viewers are experiencing losses in the tens of millions of dollars. Animal Planet, a recently launched cable network with over 30 million potential viewers and 1997 revenues of \$6.1 million, lost nearly **\$45 million** in FY 1997.<sup>11</sup> MSNBC, with 38 million potential viewers and 1997 revenues of \$75 million, lost \$60 million.<sup>12</sup>

## II. The Commission Should Modify Its New Network Exemption

These factors leave most new networks with little money for such basics as programming, and forces them to rely heavily on previously aired programs (“library programming”) rather than producing new programming. If a new network is to survive, it must carefully project every possible cost in the first few years after launch. Networks launched after enactment of the captioning requirements will include closed captioning among those costs. But networks like GSN, launched before enactment of the closed captioning requirements, did not account for the cost of closed captioning, a cost that for GSN will be about **\$18 million for its library programming alone**.

The Commission’s “one size fits all” new network exemption treats these recently launched networks in the same way it treats all other cable networks. Most startup networks launched before the captioning requirements were enacted by Congress, however, had no notice of captioning costs, and will receive absolutely no benefit from the new network exemption. GSN, for example, was launched in December 1994. Under the current closed captioning rules, GSN’s four-year new network exemption will expire in 1998 – a little more than one year before the first captioning requirements begin. Thus, GSN will face the same captioning requirements in 2000 as large, established cable networks like ESPN (1997 revenues -- \$1.065 billion), TNT (\$786 million) and USA Network (\$651 million), although GSN is certainly not on the same financial footing as these networks.

As a result, networks like GSN will be forced to deplete their already dwindling cash reserves to purchase captioning at a time when captioning resources and captioned programming are scarcest, and the cost of captioning at its peak. Funds that could have gone towards new programming will instead be used for captioning older programming – a result that neither Congress nor the Commission intended.

GSN therefore reiterates its position that the Commission should modify its new network exemption to grant a full four-year exemption from the rule’s adoption date to networks launched in the four years prior to the closed captioning regulations. After the exemption expires, networks with greater than 20 million subscribers<sup>13</sup> would be subject to the captioning requirements at the beginning of the transition schedule. Through this modification, the Commission would ensure that networks launched between 1994 and 1998 receive the full

---

<sup>11</sup> Paul Kagan Associates, *Cable Program Investor* at 5 (Feb. 24, 1998).

<sup>12</sup> *Id.*

<sup>13</sup> Even cable networks with 20 million subscribers do not have full access to advertising revenues, which usually does not occur until a network reaches 25-35 million subscribers. See *History of Start-Up Networks*, *supra* note 9 at 1.

benefit of the new network exemption till January 1, 2002. This modification would give recently launched networks the much needed time to plan for and accommodate the Commission's captioning requirements.

### **III. The Commission Should Modify Its Revenue Exemption**

Similarly, the Commission's revenue exemption expires when gross revenues reach \$3 million. Given the economics of new networks, as discussed above, \$3 million in gross revenues is de minimis and, indeed, \$3 million in gross revenues is indicative of tremendous losses. This \$3 million exemption is in reality no exemption at all. Accordingly, we believe that a gross revenue exemption of \$75 million would not be unreasonable. As discussed below, together with GSN's suggestion for captioning "significantly viewed" programming, raising the revenue exemption to \$75 million would not decrease the total captioning of the most popular cable programming. Moreover, the revised revenue exemption would have no effect on the captioning requirements as they apply to well-established cable networks, such as ESPN, USA, MTV, and others.<sup>14</sup> The following table lists the 1997 net revenue figures for basic cable networks.<sup>15</sup>

---

<sup>14</sup> See *Cable Program Investor*, *supra* note 11 at 3.

<sup>15</sup> Paul Kagan Associates, *Economics of Basic Cable Networks* (1998). "Net revenue" equals a network's gross revenue minus the commission taken by advertising agencies on advertising revenue.

CABLE NETWORK	1998 NET REVENUE (in millions)
ESPN	\$1,155.0
TNT	\$865.4
Nickelodeon	\$773.0
USA	\$731.0
CNN + HN	\$676.5
TBS	\$653.2
MTV	\$522.4
Lifetime	\$440.0
Discovery	\$421.7
A&E	\$373.0
TNN	\$332.8
Family Channel	\$319.6
CNBC	\$260.0
Fox Sportsnet	\$207.6
ESPN2	\$202.0
FX	\$200.0
TLC	\$164.7
Weather	\$164.5
VH-1	\$160.5
AMC	\$156.7
BET	\$156.5
Comedy Central	\$142.1
Sci-Fi	\$140.2
E!	\$124.4
Cartoon Network	\$111.5
CMT	\$101.4
MSNBC	\$90.0
History	\$88.2

CABLE NETWORK	1998 NET REVENUE (in millions)
HGTV	\$78.6
Bravo	\$67.2
Golf	\$61.6
Prevue	\$58.3
Court TV	\$54.0
TCM	\$46.2
Fox News	\$44.7
TV Food	\$36.1
Game Show	\$30.2
CNN/fn	\$30.1
Animal Planet	\$29.7
Classic Sports	\$28.1
Speedvision	\$24.2
The Box	\$22.7
Outdoor Life	\$22.7
Knowledge	\$22.4
ODYSSEY	\$21.4
Independent Film	\$20.6
Travel	\$19.8
CNN/SI	\$15.3
Romance	\$13.3
ESPNews	\$12.2
TV Land	\$7.2
Fit TV	\$4.6
Eye on People	\$2.5
BET on Jazz	\$2.1

#### IV. The Commission Should Require The Captioning Of “Significantly Viewed” Programming

To ensure that these proposals do not substantially affect hearing-impaired persons’ access to captioned programming, the Commission should require all cable networks, regardless of whether they are new networks or not, to caption their “significantly viewed” programming (defined as programs with a cable rating above 2.0 over a sustained period). Thus, such popular shows as “South Park” (which has a 6.1 cable rating<sup>16</sup>) would be accessible to hearing-impaired persons immediately, while less popular shows would be captioned at a more deliberate pace.

<sup>16</sup> See *Top Cable Shows*, *supra* note 7.

## **CONCLUSION**

New networks should not be disadvantaged in their efforts to compete in the video programming market. Unfortunately, the current “one size fits all” closed captioning regulations will have the effect of discouraging new networks from producing new programs or even going on the air in the first place. By allowing networks like GSN to compete successfully, the modifications suggested here will ultimately increase the amount of captioned programming overall.

# CHANNEL-LOCKED

## DBS Providers Reach for Launch Fees

By LINDA MOSS  
& MONICA HOGAN

As their distribution grows and their bandwidth shrinks, direct-broadcast satellite providers are getting upfront launch fees from new networks.

Using the leverage of their size, DirecTV Inc., EchoStar Communications Corp. and PrimeStar Inc. are looking to receive what their cable-operator rivals have collected in recent years: cash-incentive launch fees from some programmers, said officials at a number of networks.

"It's a trend," according to a spokesman for one start-up programming service, which was asked about upfront launch fees in exchange for carriage by EchoStar's Dish Network.

"We are becoming more and more challenging in our negotiations with programming services," said Denny Wilkinson, senior vice president of marketing and programming for PrimeStar. "We expect no less treatment now than somebody else our size."

*"There is limited bandwidth."*

Michael Schwimmer,  
vice president,  
programming,  
Dish Network

The launch fees most recently sought by DBS companies are hovering in the \$3- to \$6-per-subscriber range. But Rupert Murdoch's Fox News Channel anted up \$10 per subscriber to DirecTV to get added to its lineup in 1996 — similar to what it paid cable operators — according to sources.

Several years ago, it seemed like programmers wouldn't have to sweat getting carried by DBS. But new networks looking to launch now face a tough time even on that front because DBS providers are getting channel-locked and saying that they have to be more choosy about which networks they carry.

"There is limited bandwidth," said Michael Schwimmer, Dish Network's vice president of programming. "We're all working with a limited piece of property on which to put channels."

DirecTV is currently the most persistent and consistent in seeking launch fees, a number of programmer sources said. In fact, two programmers used the same word, "aggressive," to describe DirecTV's approach in negotiations regarding upfront payments, saying that DirecTV asked for \$5 to \$6 per subscriber from some networks.

DirecTV is touting itself as the equivalent of the fifth-biggest MSO, in terms of its distribution of roughly 3.5 million homes. Therefore, it is looking for the same treatment and terms that major cable operators enjoy regarding cash for carriage, network officials said.

"They've [DirecTV] taken a very aggressive position, and they've got a bit of a chip on their shoulder," said one source. "A lot of new networks have agreed to pay upfront. Getting on DTH [direct-to-home] is an important part of their strategy. And DirecTV is the TCI [Tele-Communications Inc.] of DTH."

And new networks aren't the only ones being asked to pay cash launch fees for carriage by DBS providers: Established ones are, too.

In fall 1996, The Travel Channel was the first network ever dropped from DirecTV's lineup. Travel's contract with DirecTV was up for renewal, and the DBS company asked for cash compensation in or-

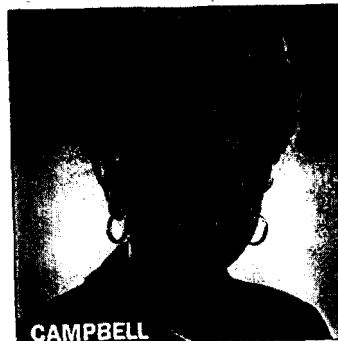
der to renew, according to sources familiar with the situation. But Travel's owner at the time, Landmark Communications Inc., refused to write the check to DirecTV, and the DBS service promptly dumped Travel and inserted FNC after its launch that Oct. 7.

DirecTV's senior vice president of programming, Stephanie Campbell, said she "could not agree" that her company was asking some networks for \$5 to \$6 per subscriber for carriage.

However, Campbell also said negotiating upfront launch fees is "not something that DBS is doing apart from the rest of the industry. It can be a part of negotiations for us and for every other distributor in America."

DirecTV uses a combination of criteria when choosing a new channel, Campbell said. The decision is based primarily on what makes the customer happy and what makes good business sense, she added.

Dish Network, with about 1 million homes, is comparable in size to the 12th-largest MSO, while PrimeStar, with 2 million subscribers, would be



the eighth largest MSO.

Sources said Dish Network is being less aggressive than DirecTV about upfront launch fees, using them as just one piece of a complicated formula that helps it to decide whether or not to carry a network.

Schwimmer said there are a variety of factors that he weighs when deciding whether

to add a programming service: a free carriage period; the license fee when payments start; subscriber interest; the extent of its cable distribution; the opportunity to drive new subscribers; the possibility of getting rate breaks on sister services of the new network; and upfront launch support.

"That's [upfront launch fees] one of the variables," he said, and they become more or less important, depending on the outcome when the other factors are weighed together.

Wilkinson agreed that launch fees play just one part in the equation. "We don't go after things that don't fit in our lineup," he said.

Newer networks are particularly vulnerable to DBS companies' requests for cash upfront. Some fledgling services — often those without deep-pocketed parents or sister services — have even paid DBS for carriage on tiers, and not for broad distribution, one programmer said.

Curtis Symonds, executive vice president of affiliate sales and marketing for Black Entertainment Television and BET on Jazz, said he wasn't aware of DBS looking for launch fees. But, he noted, "DBS companies have made it a point to drive home the fact that space is premium. And they know that they can keep new channels alive."

The Outdoor Channel, an independent programmer that has slowly, but steadily, increased its distribution to 1.8 million homes this year, isn't paying upfront launch fees to DBS providers, according to president and chief operating officer Andy Dale.

"We don't play that game," he said. The attitude of some DBS providers is, "Show me the money," according to Dale, adding that they "are getting across the fact that their band-

## **Multichannel News**

### **April 6, 1998**

width is rare, too [like cable systems']. ”

As bandwidth becomes more limited even for DBS systems, companies such as DirecTV have more of a challenge when deciding which channels to add, according to Campbell. “It’s important to choose wisely, because we don’t want to take a channel down once it’s up there,” she said.

The notion that every channel was once guaranteed carriage on DirecTV when bandwidth was more readily available is untrue, according to Campbell.

“We were never particularly capricious about adding a new channel,” she said. **MCN**